No. 98-1714

Supreme Court, U.S.
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In The

Supreme Court of the United States

FULL GOSPEL TABERNACLE AND JORGE VEGA,

Petitioners,

v.

COMMUNITY SCHOOL DISTRICT 27, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, QUEENS FEDERATION OF CHURCHES, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, CLIFTON KIRKPATRICK AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, NATIONAL ASSOCIATION OF EVANGELICALS, FAMILY RESEARCH COUNCIL, FOCUS ON THE FAMILY, LIBERTY COUNSEL, ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, AND NORTH AMERICAN MISSION BOARD, SOUTHERN BAPTIST CONVENTION, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether government officials, contrary to this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), may deny access to a community group solely because its speech includes religious worship and instruction.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The letters of the parties granting their consent to the filing of this brief have been filed with the Clerk. A complete statement of interest for each *amicus curiae* is included in the appendix.[1]

Several of the *amici* are religious organizations that have a longstanding interest in protecting equal access for private religious speakers to public facilities. *Amici* Christian Legal Society, Baptist Joint Committee on Public Affairs, National Association of Evangelicals, and Presbyterian Church (U.S.A.) have worked to secure the right of equal access for nearly two decades. Several of the *amici* have member congregations or other religious affiliates in New York, Vermont, and Connecticut, that are likely to be harmed in the near future by the discriminatory policy approved in the decision below.

SUMMARY OF ARGUMENT

The issue presented, whether government officials may deny access to a community group solely because its speech includes religious worship and instruction, is controlled by this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, this Court ruled that "religious worship and discussion . . . are forms of speech and association protected by the First Amendment." *Id.* at 269.

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[1] Counsel for a party did not author this brief in whole or in part. No one, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. *Amicus* Christian Legal Society received a grant from the Alliance Defense Fund to cover its expenses in producing this brief. The Alliance Defense Fund is a 501(c)(3) organization headquartered at 7819 East Greenway Road, Suite 8, Scottsdale, Arizona 85260. The Alliance Defense Fund exercised no control over the content of the brief.

This Court specifically rejected the premise of the courts below that religious worship and instruction may be segregated from other speech for discriminatory exclusion. This Court repudiated the argument that government officials could distinguish religious worship or instruction from other types of speech because the distinction:

1) lacks "intelligible content" (*id.* at 269 n.6);

2) is inadministrable by government officials (*id.* at 269-270 n.6, 271 n.9);

3) creates a risk of excessive entanglement between government officials and religion in determining which religious speech is permissible and which religious speech is impermissible (*id.* at 272 n.11); and

4) is irrelevant (*id.* at 270 n.6).

Free speech protection of religious instruction and worship has been reaffirmed in numerous decisions by this Court before and since *Widmar*. *See, e.g., Capitol Square Review Board v. Pinette*, 515 U.S. 753 (1995); *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995); *Board of Education v. Mergens*, 496 U.S. 226 (1990); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Moreover, the courts below affirmed a policy that *on its face* discriminates against community groups wishing to engage in religious worship or religious instruction, a blatant violation of the governmental neutrality required by both the Free Exercise Clause and the Establishment Clause. *See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Division v. Smith*, 494 U.S. 872 (1990); *McDaniel v. Paty*, 435 U.S. 618 (1978). The Free Exercise Clause prohibits government officials from penalizing conduct done for religious reasons while allowing the same conduct done for secular

reasons. *See Lukumi*, 508 U.S. at 534-537. Furthermore, the Establishment Clause is violated by government officials' attempts to sever religious worship or instruction from other speech, because such attempts result in an excessive entanglement of government officials with religion. *Widmar*, 454 U.S. at 272 n.11.

Most troubling, the decisions below sanction governmental discrimination among religions, favoritism the Establishment Clause vigilantly prohibits. *See Larson v. Valente*, 456 U.S. 228 (1982). Despite undisputed record evidence that previous uses by other religious groups for worship and instruction had been permitted, the courts below upheld the school officials'[2] denial of access to Full Gospel Tabernacle. (App.[3] 17a-22a).

The Second Circuit's decisions below also threaten the religious speech rights of citizens living outside the Second Circuit. Earlier decisions of the Second Circuit have been particularly damaging to the equal access right of private religious speakers. For example, the Second Circuit's decision in *Brandon v. Guilderland Central Sch. Dist.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), triggered a nationwide suppression of high school students' extracurricular religious speech. An Act of Congress, the Equal Access Act, 20 U.S.C. § 4071 (1994), and a decision by this Court, *Board of Education v. Mergens*, 496 U.S. 226 (1990), were necessary to repair the extensive

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[2] School officials in this case include school custodians, who in some schools apparently make the initial decision whether a group's meetings violate the policy against religious worship or instruction. App. at 9a ("Typically, an application to use school facilities after school hours is first reviewed by the custodian and the principal for the school which the organization seeks to use."), 10a, 21a.

[3] "App." references pages in the Appendix of the Petition for Writ of Certiorari filed in this case.

damage done to religious speech by the *Brandon* decision. *See also Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), *rev'g*, 959 F.2d 381 (2d Cir. 1992) (denying equal access to religious community group seeking access to school auditorium during evenings and weekends).

The decisions below rest upon a 1997 Second Circuit decision denying equal access to community groups seeking weekend access to school facilities for religious worship and instruction, *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998). The Second Circuit's decisions are being used by government officials beyond the Second Circuit to justify discriminatory treatment of religious community groups. *See DeBoer v. Village of Oak Park*, 1999 WL 104726, *4 (N.D.Ill. Feb. 23, 1999) ("Had we been presented with the facts of *Bronx Household*, we would have reached the same conclusion."), *on appeal*, No. 99-1706 (7th Cir. 1999).

Amici respectfully suggest that the decision below meets the criteria for summary reversal because the decision below presents an issue clearly controlled by this Court's authority in *Widmar v. Vincent*. In the alternative, *amici* respectfully request that this Court grant the petition for writ of *certiorari*.

ARGUMENT

I. The decisions below are directly contrary to the controlling authority of this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981).

The decisions below[4] cannot be reconciled with this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981),

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[4] We refer to "the decisions below" because the Second Circuit decision below consists of a single sentence affirming

in which this Court rejected a state university's attempt to prohibit a student group from meeting solely because the group wished to engage in religious worship or instruction. Numerous decisions by this Court before and after *Widmar* have protected citizens' religious speech, including worship and instruction. Forty years before *Widmar*, the Court held that a government official could not exercise unbridled discretion to determine whether private citizens' speech was religious. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). This bedrock principle was also applied in *Fowler v. Rhode Island*, 345 U.S. 67 (1953), when this Court rejected a city ordinance that had been interpreted to allow "religious services" in a park but not "religious addresses." In *Fowler*, this Court stated that it was not "in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings." *Id.* at 70. Finally, *Widmar* has been the basis of several decisions by this Court and lower federal courts protecting private religious expression, with which the decisions below conflict.

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the judgment of the district court for "substantially the reasons stated by" the district court. (App. 2a). The Second Circuit could be so succinct in this case because the district court relied upon the Second Circuit decision in *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998), in which the Second Circuit approved the discriminatory denial of equal access to community groups for religious worship or instruction.

A. In *Widmar*, the Supreme Court rejected a policy essentially identical to the school district policy in this case and ruled that groups seeking to meet for religious worship and religious instruction may not be discriminatorily denied access.

As in this case, in *Widmar*, public university officials did not deny *all* access to a religious group but *conditioned* access upon the group agreeing not to use the university facilities for "religious worship" or "religious teaching." 454 U.S. at 265, 266 n.3. Indeed, the University had "routinely approved" access to university facilities for the student religious group for a number of years. *Id.* at 266 n.3. The University denied the student religious group continued access only after the University realized that the group's meetings included religious worship and religious teaching. *Id.* The University then concluded that the students' meetings violated its policy "prohibit[ing] the use of University buildings or grounds 'for purposes of religious worship or religious teaching.' " *Id.* at 265.

Like the university officials in *Widmar*, the respondent school district has denied access to school facilities during nonschool hours to a community group solely because the group's speech would include religious worship and religious instruction. While it allows the group to distribute religious literature or discuss religious material at its meetings, the school district policy, Standard Operating Procedure ("SOP") 5.9, prohibits religious services or instruction, stating:

> No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or

> material which contains a religious viewpoint or for distributing such material is permissible.

App. 34a.

In *Widmar*, the Supreme Court held such a policy unconstitutional because it violated "the fundamental principle that a state regulation of speech should be content-neutral." 454 U.S. at 277. *Accord Rosenberger v. University of Virginia*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.")

In *Widmar*, the Supreme Court specifically ruled that "religious worship and discussion . . . are forms of speech and association protected by the First Amendment." 454 U.S. at 269, *citing Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948). Most recently, noting that "government suppression of speech has so commonly been directed precisely at religious speech," this Court reiterated that freedom of speech protects "even acts of worship." *Capitol Square Review Board v. Pinette*, 515 U.S. 753, 760 (1995), *citing Widmar*, 454 U.S. at 269 n.6.

In *Widmar*, this Court rejected the argument that religious worship can be distinguished from other religious speech and discriminatorily excluded from public facilities for four reasons:

1. The distinction lacks "intelligible content." A distinction between "religious worship and instruction" and other speech lacks "intelligible content" because, as this Court explained in *Widmar*:

> There is no indication when 'singing hymns, reading scripture, and teaching biblical principles,' cease to be 'singing, teaching, and reading' – all apparently forms of 'speech,' despite

> their religious subject matter – and become unprotected 'worship.'

454 U.S. at 269 n.6 (citation omitted). *See Rosenberger*, 515 U.S. at 845. *See also Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 534-537 (1993) (government violates Free Exercise Clause when it prohibits conduct done for religious reasons while allowing similar conduct done for secular reasons).

2. The distinction is inadministrable by government officials. In *Widmar*, this Court concluded that government officials should not be making the inquiries necessary to administer a distinction between religious worship or instruction and other speech. Indeed, this Court "doubt[ed] that it would lie within the judicial competence to administer" a distinction between "religious worship" and other "religious speech," (454 U.S. at 269 n.6), and characterized the distinction as "judicially unmanageable," (*id.* at 271 n.9). As this Court explained:

> Merely to draw the distinction would require the university – and ultimately the courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.

Id. at 269 n.6 (citations omitted). *See also Rosenberger*, 515 U.S. at 845.

Similarly, in *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953), this Court rejected a city ordinance that had been interpreted to allow "religious services" in a park but not "religious addresses." This Court characterized government officials' determination that speech was a "sermon" as opposed to an "address" as "merely an indirect way of preferring one religion over another." *Id.* at 70. This Court stated that it was not "in the competence of courts under

our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings." *Id.*

Similarly, in its landmark decision in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court held that government officials may not exercise unbridled discretion to determine whether speech is or is not religious. As Justice Souter has remarked, it is hard to "imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible" than determinations about the religious content of speech. *Lee v. Weisman*, 505 U.S. 577, 616-617 (1992) (Souter, J., concurring). *See also Employment Division v. Smith*, 494 U.S. 872, 889-890 n.5 (1990) (federal judges should not "regularly balance against the importance of general laws the significance of religious practice"); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) ("[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious.").

3. The distinction will result in excessive entanglement between government officials and religion. Inquiries by government officials trying to administer a distinction between religious worship and other religious speech "would tend inevitably to entangle the State with religion in a manner forbidden by [this Court's] cases." *Widmar*, 454 U.S. at 269-270 n.6. Excessive entanglement would result because government officials "would need to determine which words and activities fall within 'religious worship and religious teaching.' " *Id.* at 272 n.11. The Court suggested such determinations were "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *Id.* (quotation marks and citation omitted).

Again, in *Rosenberger*, this Court condemned such decisionmaking by government officials as raising "the specter of governmental censorship." 515 U.S. at 844. The Court continued:

> As we recognized in *Widmar*, official censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis.

Id. at 845.

Beyond the "impossible task" of determining which words constitute "religious worship and religious teaching," the Court in *Widmar* recognized that application of such a policy would create "a continuing need to monitor group meetings to ensure compliance with the rule." 454 U.S. at 272 n.11. *See also Board of Education v. Mergens*, 496 U.S. 226, 248, 253. This continual supervision of religious groups' meetings is itself the quintessential example of unconstitutional excessive entanglement.

Because the school district policy in this case is essentially identical to the university policy struck down in *Widmar*, it creates the same excessive entanglement between school district officials and religion. In its overly zealous attempt to avoid an Establishment Clause violation, the court below infringed upon the Establishment Clause by permitting government officials to implement a policy distinguishing between "religious discussions" and "religious services or instruction."

4. The distinction is irrelevant for constitutional purposes. In *Widmar*, this Court stated:

> [There is] no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts than for religious worship by persons already converted.

454 U.S. at 270 n.6 (citation omitted). In a long line of pre-*Widmar* precedent, the Court has held that the First Amendment protects private speech for purposes of proselytizing persons of other faiths, or persons of no particular faith.[5] In *Widmar*, this Court saw no valid reason for distinguishing these numerous precedents in order to give less protection to religious worship and instruction among members of the same faith. In other words, religious worship and instruction among members of the same faith should be *at least* as protected as religious speech (such as religious literature distribution) to persons who do not agree with, and often object to, a particular religious message.

Ironically, in the Second Circuit, worship exercises by *student* religious groups immediately before or after school on public secondary school campuses must be permitted, while worship exercises by *community* religious groups on weekends are discriminatorily excluded from the same schools. *Compare Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir.), *cert. denied*, 519 U.S. 1040 (1996) (the Equal Access Act, 20 U.S.C. § 4071

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[5] See, for example, *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (religious speech in park); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (same); *Kunz v. New York*, 340 U.S. 290 (1951) (denunciation of religion on public streets); *Saia v. New York*, 334 U.S. 558 (1948) (amplification of religious speech in public park); *Marsh v. Alabama*, 326 U.S. 501 (1946) (religious solicitation); *Tucker v. Texas*, 326 U.S. 517 (1946) (same); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (same); *Largent v. Texas*, 318 U.S. 418 (1943) (religious literature distribution); *Jamison v. Texas*, 318 U.S. 413 (1943) (same); *Martin v. Struthers*, 319 U.S. 141 (1943) (same); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (religious solicitation); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (religious literature); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (same).

(1994), protects secondary student religious meetings for religious worship and instruction) *with Bronx Household of Faith v. Community School District*, 127 F.3d 207, 213 (distinguishing Equal Access Act cases, including *Hsu*, to deny equal access on weekends to community group for religious worship and instruction), *cert. denied*, 118 S. Ct. 1517 (1998).[6]

B. The decisions below conflict with numerous decisions by this Court and lower federal courts protecting equal access for private religious expression.

This Court's decision in *Widmar* rests on numerous earlier decisions requiring government to be neutral in its treatment of citizens' religious speech. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Kunz v. New York*, 340 U.S. 290 (1951); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *cf., McDaniel v. Paty*, 435 U.S. 618 (1978) (prohibiting discriminatory treatment based on religious profession). And *Widmar* is the bedrock for this Court's important subsequent decisions in *Board of Education v. Mergens*, 496 U.S. 226 (1990) (applying *Widmar* to uphold constitutionality of Equal Access Act, 20 U.S.C. § 4071 (1994), requiring equal access for student religious groups for prayer and Bible study

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[6] The United States Secretary of Education has advised school superintendents that student religious groups' meetings for religious worship and instruction are protected in public secondary school facilities, as follows:

> *Prayer services and worship exercises covered:* A meeting, as defined and protected by the Equal Access Act, may include a prayer service, Bible reading, or other worship exercise.

Religious Expression in Public Schools, Department of Education, Letter from Secretary Richard Riley (August 10, 1995).

on public secondary school property); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (applying *Widmar* to protect equal access for community religious group to public school facilities that were assumed to be a nonpublic forum); *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) (applying *Widmar* to require equal access for a student religious publication to university student funding program, treating the program as a "limited public forum"); *Capitol Square Review Board v. Pinette*, 515 U.S. 753 (1995) (applying *Widmar* to uphold equal access for self-defined religious speakers in a public forum).

This Court's decision in *Widmar* is also the foundation for numerous lower court decisions protecting the right of equal access for private religious expression. *Amici* agree with Petitioners' argument that the decision below directly conflicts with the decisions of other circuits, particularly in *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir.), *cert. denied*, 519 U.S. 949 (1996), and *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703 (4th Cir.), *cert. denied*, 511 U.S. 1143 (1994). *See also Good News/Good Sports Club v. Ladue Sch. Dist.*, 28 F.3d 1501 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995); *Grace Bible Fellowship v. Maine School Admin. Dist. No. 5*, 941 F.2d 45 (1st Cir. 1991); *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366 (3rd Cir.), *cert. denied*, 498 U.S. 899 (1990); *Concerned Women for America v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989).[7]

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[7] Numerous additional federal appellate decisions have relied upon the *Widmar* analysis to protect equal access for private religious expression to public school property in a variety of contexts. *See, e.g., Ceniceros v. Board of Education of San Diego Sch. Dist.*, 106 F.3d 878 (9th Cir. 1997); *Hedges v. Wauconda Community Sch. Dist.*, 9 F.3d 1295 (7th Cir. 1993); *Sherman v. Community Sch. Dist.*, 8 F.3d 1160 (7th Cir. 1993), *cert. denied*, 511

Widmar is the controlling authority for the issue presented by this case: whether government officials may deny access to a community group solely because its speech includes religious worship or religious instruction. By refusing to apply *Widmar*, the decision below conflicts with numerous precedents of this Court and lower federal courts.

C. The decisions below are directly contrary to this Court's Establishment Clause and Free Exercise Clause decisions requiring government officials to treat religion in a neutral manner.

The discriminatory treatment of private religious speakers sanctioned by the decisions below violates the core requirement of the Establishment and Free Exercise Clauses that government officials treat religion in a neutral manner. As the Court explained in *Mergens*:

> [I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. 'The Establishment Clause does not license government to treat religion and those *who teach or practice it*, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.'

U.S. 1110 (1994); *Garnett v. Renton Sch. Dist.*, 987 F.2d 641 (9th Cir.), *cert. denied*, 510 U.S. 819 (1993); *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244 (3d Cir. 1993). *See also Shumway v. Albany County Sch. Dist.*, 826 F. Supp. 1320 (D. Wyo. 1993); *Randall v. Pegan*, 765 F. Supp. 793 (W.D.N.Y. 1991); *Verbena United Methodist Church v. Chilton County Bd. of Educ.*, 765 F. Supp. 704 (M.D. Ala. 1991); *Youth Opportunities Unlimited v. Bd. of Educ.*, 769 F. Supp. 1346 (W.D. Pa. 1991); *Country Hills Christian Church v. Unified Sch. Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983).

496 U.S. at 248 (plurality opinion) (emphasis added), *quoting McDaniel v. Paty*, 435 U.S. 618, 641 (Brennan, J., concurring in judgment).

1. A government policy that on its face discriminates against religious persons violates the Free Exercise Clause and the Establishment Clause. In determining whether government officials have violated the Free Exercise Clause, this Court begins by examining the text of the law, "for the minimum requirement of neutrality is that a law not discriminate on its face." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). A law that is not neutral toward religion on its face must be justified by a compelling governmental interest narrowly tailored to advance that interest. *See Employment Division v. Smith*, 494 U.S. at 886 n.3; *Lukumi*, 508 U.S. at 531-532. Similarly, in Establishment Clause analysis, this Court examines statutes for facial neutrality toward religion. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 60-61 (1985).

The school district policy fails this minimal requirement of facial neutrality because it explicitly states that community groups wishing to engage in religious services or instruction will be automatically denied access. *See also Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703, 707 (4th Cir.), *cert. denied*, 511 U.S. 1143 (1994) (school board policy that discriminatorily charged churches higher rental than other community groups for access to school facilities after school hours violated free exercise rights of church).

2. A government policy that discriminates against conduct done for religious reasons while allowing the same conduct done for secular reasons violates the Free Exercise Clause. This Court has held that a governmental policy that creates an anti-religion gerrymander, by prohibiting conduct undertaken for religious purposes while

allowing the same conduct when done for secular purposes, violates the Free Exercise Clause. *Lukumi*, 508 U.S. at 532. The anti-religion gerrymander in this case is explicit. Not only does the text of the policy discriminate against religious speech, but the policy is applied in a discriminatory manner. Community groups are allowed access for "the purpose of instruction in any branch of education, learning or the arts," but access for *religious* instruction is denied. *Compare* SOPM 5.6.1 *with* SOPM 5.9 (App. 33-34a). Singing is allowed unless it is for the purpose of religious worship. Drama is allowed unless its purpose is religious instruction. Speaking is allowed unless it is for worship or religious instruction. This is a blatant violation of the Free Exercise Clause. *Lukumi*, 508 U.S. at 534-537.

3. The decisions below permit differential treatment by government officials among religious groups, a basic violation of the Establishment Clause. Allowing government officials to determine whether speech is "religious worship or instruction" provides fertile ground for discrimination among religions, which the Establishment Clause prohibits. *Fowler v. Rhode Island*, 345 U.S. at 70 (distinguishing between religious "sermon" and "address" is "merely an indirect way of preferring one religion over another"). Government officials' review of the religious content of speech "risk[s] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires". *Rosenberger*, 515 U.S. at 845-846. *See also Larson v. Valente*, 456 U.S. 228 (1982).

Precisely such discrimination has been permitted by the decisions below, in which the school district denied access to a church for worship and instruction despite undisputed record evidence that the school district previously had allowed two other churches access for religious

worship and instruction. App. at 17a-22a. Community groups were also allowed access to school facilities for gospel concerts and a religious party. App. at 6a n.3. *See also* Note, *First Amendment – Public Forum – Second Circuit Holds that Middle School Auditorium is not a Public Forum and that Exclusion of Religious Activities is Permissible*, 111 Harv. L. Rev. 1608, 1613 (1998) (criticizing "circular argument [of *Bronx Household*] [that] would empower the School District to act as a censor").

4. The decisions below will require school officials to determine whether religious speech is religious worship, religious instruction, or "permissible" speech, in violation of the Establishment Clause. Finally, as discussed *supra* at pp. 9-10, in *Widmar*, this Court noted that a policy prohibiting religious worship and instruction was likely to create excessive entanglement between government officials and religion, an additional violation of the Establishment Clause. 454 U.S. at 272 n.11. *See Mergens*, 494 U.S. at 248, 253; *Rosenberger*, 515 U.S. at 844-845.

In this case, community groups were allowed access to school facilities for gospel concerts and a religious party. App. at 6a n.3. School officials will be required to determine whether gospel concerts, religious parties, religious dinners, and other community uses, involve religious worship or religious instruction. *See, e.g., Travis v. Owego-Apalachin School District*, 927 F.2d 688, 693 (2d Cir. 1991) (school officials' confusion whether community group's Christmas program was religious); *Country Hills Christian Church v. Unified School District No. 512*, 560 F. Supp. 1207, 1218 (D. Kan. 1983) (school officials' confusion about the permissibility of various community groups' activities with religious components).

II. Past Second Circuit decisions denying equal access for private religious speakers have had a negative national impact on religious citizens' free speech rights.

The decision below must be placed in context in order to understand the threat it poses to the free speech rights of citizens living outside, as well as within, the Second Circuit. A previous Second Circuit decision was singularly damaging to equal access for private religious expression. *Brandon v. Guilderland Central Sch. Dist.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). In *Brandon*, the Second Circuit ruled that a school district would violate the Establishment Clause if it permitted a student religious group to meet for prayer and Bible study in an empty classroom before school began. *Id.* at 979. Distinguishing "prayer" from "discussions about religious matters," the Second Circuit ruled that "the protections of political and religious speech are inapposite" for students meeting for prayer. *Id.* at 980 (citations omitted).

Fueling a decade of equal access litigation, the *Brandon* decision was followed by other courts of appeals to deny equal access for high school students engaging in religious speech, including prayer and worship. *See Garnett v. Renton Sch. Dist.*, 865 F.2d 1121 (9th Cir. 1989) (relying on *Brandon* to hold Equal Access Act unconstitutional), *vacated*, 496 U.S. 914 (1990), *on remand*, 987 F.2d 641 (9th Cir.) (relying on *Mergens*, Equal Access Act requires equal access for high school student religious group), *cert. denied*, 510 U.S. 819 (1993); *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 551-557 (3d Cir. 1984) (citing *Brandon*, Establishment Clause trumps free speech right of high school student group to meet for religious speech, including prayer and Bible study), *vacated on jurisdictional grounds*, 475 U.S. 534 (1986); *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669

F.2d 1038, 1045-1046 (5th Cir. 1982) (relying on *Brandon* to rule that school district policy allowing equal access for religious student groups would violate the Establishment Clause), *cert. denied*, 459 U.S. 1155-1156 (1983).

Ultimately, an Act of Congress, the Equal Access Act, 20 U.S.C. § 4071 (1994), and a decision by this Court, *Board of Education v. Mergens*, 496 U.S. 226 (1990), were necessary to repair the damage done to religious speech by the *Brandon* decision. *Mergens*, 496 U.S. at 239 (Equal Access Act "enacted in part in response to" *Brandon*), *citing* S. Rep. No. 98-357 at 6-9, 11-14 (1984) (describing damage done across the country by the *Brandon* decision).

Again, in 1993, this Court unanimously reversed the Second Circuit in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), to uphold the right of access to a public school auditorium during non-school hours for a church to show a film series with religious content. Because this Court reviewed and reversed the Second Circuit decision quickly, the potential damage of *Lamb's Chapel* was contained. *See, e.g., Good News/Good Sports Club v. Ladue Sch. Dist.*, 859 F. Supp. 1239 (E.D. Mo. 1993) (citing Second Circuit decision in *Lamb's Chapel*, court denied access to religious community group for after-school use on same basis as another community group), *rev'd*, 28 F.3d 1501 (8th Cir. 1994) (relying on Supreme Court decision in *Lamb's Chapel*, court required access for religious community group to school facilities after-school on same basis as another community group), *cert. denied*, 515 U.S. 1173 (1995).

If allowed to stand, the decision below is likely to have negative repercussions for private religious expression across the country. The Second Circuit's decision in *Bronx Household*, which is the basis of the decisions below, has been used by government officials outside the Second Circuit to justify their discriminatory treatment of private religious speakers. *See DeBoer v. Village of Oak Park*, 1999 WL 104726, *4 (N.D.Ill. Feb. 23, 1999) ("Had we been

presented with the facts of *Bronx Household*, we would have reached the same conclusion."), *on appeal*, No. 99-1706 (7th Cir. 1999).

CONCLUSION

The decision below is directly contrary to this Court's decision in *Widmar*. The decision below is entirely inconsistent with numerous decisions by this Court under the Free Speech, Free Exercise and Establishment Clauses, requiring government officials to treat religious citizens in a neutral manner. The decision below threatens the stability and correct application of a long line of precedents of this Court and lower federal courts, upholding the right of equal access for private religious expression.

Amici respectfully suggest that this case is one of the exceptional cases in which it would be appropriate for the Court to grant the petition for writ of *certiorari* and summarily reverse the ruling of the court below. In the alternative, *amici* urge this Court to grant the petition for writ of *certiorari* for full argument before this Court.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus the **Christian Legal Society** ("CLS"), through the **Center for Law and Religious Freedom** (the "Center"), its legal advocacy and information arm, has since 1975 argued in state and federal courts throughout the nation for the protection of religious speech, association and exercise. Founded in 1961, CLS is an ecumenical professional association of 4,500 Christian attorneys, judges, law students, and law professors, with chapters in every state and at 85 law schools.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise and the autonomy of religious institutions. In addition, the CLS Center has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive, Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by

the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . . "

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious liberty.

The **Queens Federation of Churches, Inc.**, was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 290 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. The Queens Federation of Churches has appeared as *amicus curiae* previously in a variety of actions for the purpose of defending religious liberty. The Queens Federation of Churches and its member congregations are vitally concerned for the protection of the principle and practice of religious liberty, believing that governmental hostility to and discrimination against religious speech and religious worship, as in the present case, are

egregious offenses against citizens which can only breed more destructive intolerance.

The **Union of Orthodox Jewish Congregations of America** (the "U.O.J.C.A.") is a non-profit synagogue organization for over 1,000 Jewish congregations throughout the United States. It is the largest Orthodox Jewish umbrella organization in this nation. Through its Institute for Public Affairs, the U.O.J.C.A. researches and advocates the legal and public policy positions promoted by the mainstream Orthodox Jewish community. The U.O.J.C.A. has filed briefs in federal and state courts throughout the nation in cases that affect the interests of the Jewish community and American society at large.

The U.O.J.C.A. has been particularly active and interested in cases that center upon the role of religion in our society and the interpretation and application of the Establishment and Free Exercise clauses in that regard. It has been the consistent position of the U.O.J.C.A. that the Establishment Clause does not require government to disfavor religion in any way. Thus, the U.O.J.C.A. joins in this brief for it believes that the court below erred in its interpretation of what the Establishment Clause requires.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the **Presbyterian Church (U.S.A.)**. The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 2,750,000 active members in 11,500 congregations organized into 172 presbyteries under the jurisdiction of 15 synods.

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

Presbyterians have long supported the separation of Church and State. It was Presbyterians that sought this separation at the founding of this Nation. However in its 1988 policy statement, *God Alone is Lord of the Conscience*, the 200th General Assembly adopted a policy that said: "Religious speech and assembly by private citizens and organizations, initiated by them, is protected both by the Free Exercise of Religion and Free Speech clauses of the Constitution and cannot be excluded from public places." The Stated Clerk urges this Court to accept jurisdiction over this very important matter.

The **Church of Jesus Christ of Latter-day Saints** is an unincorporated religious association headquartered in Salt Lake City, Utah. Church membership exceeds 10.5 million with more than 25,000 congregations located throughout the world.

Firmly embedded in the tradition and teachings of the LDS Church are the concepts of religious freedom and toleration: "We claim the privilege of worshiping almighty God according to the dictates of our own conscience and allow all men the same privilege let them worship how, where, or what they may." Article of Faith, No. 11.

The **Baptist Joint Committee on Public Affairs** is composed of representatives from various cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to ensure the religious liberty of all Americans. The Baptist Joint Committee's supporting bodies include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptists Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptist through various state conventions and churches. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The **National Association of Evangelicals** is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 43,500 churches from 74 denominations and serves a constituency of approximately 27 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The **Family Research Council** is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and

analysis for the legislative, executive, and judicial branches of the federal government, the Council seeks to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation.

Our legal and public policy experts are continually sought out by federal and state legislators for assistance and advice on the unique relationship between parents and their children. Our expertise has been of particular importance to members of the United States Congress.

Throughout its fifteen-year history protecting the interests of mothers and children in the context of abortion has been of particular importance to the Family Research Council. The Family Research Council has participated in numerous *amicus curiae* briefs in the United States Supreme Court and federal courts. Charles A. Donovan is the Executive Vice President and acting C.E.O. Janet M. LaRue is the Senior Director of Legal Studies.

Focus on the Family is a California religious nonprofit corporation committed to strengthening the family in the United States and abroad. Focus on the Family distributes a radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada and other western countries. Focus on the Family publishes and distributes *Focus on the Family* magazine and other literature that is received by more than 2 million households each month. From its widespread network of listeners and subscribers, Focus on the Family receives an average of more than 33,000 letters each week and represents Americans numbering in the hundreds of thousands.

Liberty Counsel is a nonprofit religious civil liberties education and legal defense organization dedicated to preserve religious freedom. Established in 1989, Liberty Counsel's charter is to provide information on First Amendment religious rights, and pro bono legal defense to defend those rights. Liberty Counsel's efforts reach nationwide to protect our religious civil liberties. Liberty Counsel defends the rights of all citizens and organizations to equal access to public facilities for peaceful meetings, conferences, and assemblies.

The **Southern Baptist Convention** is the nation's largest Protestant denomination, with over 15.9 million members in over 40,000 local churches. **The Ethics and Religious Liberty Commission** is the public policy agency of the Convention and is assigned to address religious liberty and other public policy issues. *Amicus* produces publications and seminars to educate Southern Baptists about ethical and moral issues in daily Christian life, and to advocate responsible Christian citizenship as part of biblical decision-making. *Amicus* also seeks to bring biblical principles and Southern Baptist convictions to bear upon public policy debates before courts, legislatures and policy-making bodies. *Amicus* frequently files briefs as *amicus curiae* in important religious liberty litigation, such as this case.

The **North American Mission Board of the Southern Baptist Convention** is the agency responsible for mission work, church planting, and evangelism in the United States. Together with its ministry partners, NAMB starts more than 1400 churches per year, many of whom are started in school facilities and could be directly affected by the issue in this case.